CWI of Maryland, Inc. *and* Drivers, Chauffeurs, Warehousemen and Helpers Local Union #639, a/w International Brotherhood of Teamsters, AFL–CIO *and* Oren L. Simpson. Cases 5–CA–25971 and 5–CA–26514

May 18, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On December 19, 1997, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent also filed a motion to strike the General Counsel's brief and to sanction counsel for the General Counsel for assertedly engaging in a scurrilous attack on the judge. We find no merit in this contention, and we therefore deny the motion.

[2] Member Hurtgen disavows the judge's implication that the General Counsel has established the element of animus in support of a prima facie showing that the Respondent discharged Simpson for protected concerted activity. The judge relied on *antiunion* animus by the Respondent in a prior proceeding, *CWI of Maryland, Inc.*, 321 NLRB 698 (1996), not animus directed at *protected concerted* activity that is not union activity. It does not necessarily follow that a respondent who retaliates against union activity is predisposed to interfere with the exercise of nonunion activities protected by Sec. 7 as well.

Ronald Broun, Esq., for the General Counsel.
Joel I. Keiler, Esq., of Reston, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Washington, D.C., on September 29 and 30, 1997, on the General Counsel's complaint which alleged that the Respondent discharged two individuals in violation of the National Labor Relations Act (the Act) and committed a violation of Section 8(a)(1).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the two individuals were discharged for cause.

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Maryland corporation engaged in the business of transporting refuse from Washington, D.C., to landfills in Virginia, during the course of which business it annually performs services valued in excess of $50,000 for Browning Ferris Industries (BFI), an enterprise engaged in interstate commerce and over which the Board has asserted jurisdiction on a direct basis. It is admitted, and I conclude, that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Drivers, Chauffeurs, Warehousemen and Helpers Local Union #639, a/w International Brotherhood of Teamsters, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

By way of background, the Union began an organizational campaign among the Respondent's employees in September 1994, during which the Respondent was found to have engaged in numerous unfair labor practices, including interrogation, threats, surveillance, the discharge of one employee, and the constructive discharge of the entire bargaining unit because of their union activity. The Board ordered the Respondent to cease such activity, revoke its move of the drivers' reporting site, make them whole and to recognize and bargain on request with the Union. *CWI of Maryland, Inc.*, 321 NLRB 698 (1996), enfd. in part 127 F.3d 319 (4th Cir. 1997). Only the single discharge was not enforced. These consolidated cases involve subsequent events.

Daren Boran was hired in June 1994 as a full-time driver, hauling refuse from a transfer station in Washington to a landfill in Virginia, a trip of about 150 miles each way. He signed an authorization card for the Union in September and in November asked Transportation Manager Dino Sawyer go to part time, apparently working only Saturdays. In late December he asked Sawyer to return to full-time employment, and Sawyer agreed, stating that ''they were opening a drop lot'' in Virginia which would be closer for him.

After returning as a full-time driver in January 1995, Sawyer told Boran that he heard Boran had signed an authorization card, a fact which Boran confirmed. According to Boran, Sawyer ''said just keep quiet and do your job. I asked him if he was going to fire me, and as I recall he didn't reply to it.'' About a week later, after a meeting Lash had with new employees, Boran told Sawyer he was still ''nervous about signing the union card'' and thought he ought to tell Lash. Sawyer told him not to, that Lash did not know Boran had signed a card.

Shortly after this, Boran spoke with Sawyer on the occasion of the Respondent's paycheck bouncing. According to Boran, Sawyer ''said he would take care of that, take care of any bounced check charges. And then he said, I hear you been stirring up trouble down there.'' Boran told him no and

Sawyer ''said, why don't you pack your f____ bags and leave?'' Sawyer did not testify.

In late February or early March Willie Mahanes became Boran's immediate supervisor. In the summer of 1995, according to Boran, ''I asked Willie why the D.C. owner for the D.C. has—the management on Olive Street had such a disliking to me. He stated he wasn't too sure, but that he would say that it was because of my signing the union card, that I was involved with the union.'' This was during a conversation they had concerning an incident Boran had that day when Boran hit another truck and caused damage to the door and mirrors. Boran was given a disciplinary warning by Mahanes on July 18 for this offense. Boran also testified that during this discussion, Mahanes said that ''they were looking for any reason that they could to get rid of me, and that he was pretty sure that it was because of the union activity; that he was quite sure of it.'' Though agreeing that Boran asked the question, Mahanes denied he gave the response Boran attributed to him.

Boran was also given disciplinary warnings by Mahanes on May 19 (for driving too fast, hitting a hole, and breaking the gear shift lever) and December 9 and 13. Finally he was discharged following an incident on December 15 wherein he broke the bumper off the truck while going into a land fill.

The incidents of December 8 and 13 involved substantial damage to the truck Boran was driving. Specifically, according to the disciplinary report given by Mahanes, the incident of December 8 involved Boran pulling a trailer without having checked to see if the brakes were releasing. Thus he drove with the breaks half locked on the right rear and as a result, the brake shoe, wheel and both tires on that wheel were damaged. Boran did not deny or explain this incident.

On December 13, Boran's truck had an air leak and he was told to take an empty trailer to Washington and have the truck fixed. He did, and then he took a loaded trailer back to the drop site at Central Garage, Virginia. As he backed into the landfill, he ''heard a burst of air.'' He saw nothing wrong, but had the truck pulled out of the landfill by the BFI dozer operator. According to Boran, the mechanic then worked on the truck, but when Boran put it in reverse there was load bang. He saw nothing wrong, dumped the load, and called Mahanes. His truck was towed to Central Garage.

According to the disciplinary warning Mahanes wrote, Boran broke the airline to the right rear chamber and with the truck in gear, by having the dozer operator pull it Boran ''tore the Rear end out of the truck.''

Before telling Mahanes on December 15 about breaking off a piece of bumper, Mahanes ''told me that he was told if anything else was broken by me that they were going to fire me.'' Boran then told him of the accident and Mahanes said that ''they were looking for any reason that they could to fire me and that this was a good excuse, the breaking of the drive train on my assigned truck and this . . . .'' The Respondent was looking for an excuse, according to Boran's testimony, ''Because of the union activity, signing the union card.'' According to Mahanes, Boran was discharged because ''[w]e couldn't keep enough trucks running to keep him working. It cost us more to keep him working than he was making.''

Early in the morning of June 24, 1966, after having made one run, Oren Simpson arrived at the W Street site in Washington to discover that the BFI loader was broken. He had picked up a trailer which had been loaded previously, but on returning found no trailer loaded and the loader still broken. He and 9 or 10 other drivers waited and midmorning Sawyer arrived.

The drivers discussed being paid for their time and when the loader would be fixed. According to Simpson, ''somebody made the statement that somebody ought to talk to Dino about it'' and ''I said, well, I'll go talk to Dino and ask him. That's all I was going to do is ask him if we were going to be compensated, and I did.'' Sawyer said he would talk to Lash about it, and when Lash arrived, according to Simpson, he ''came over to the group where we were standing and he looked right dead at me. And he said, 'you'll all be compensated for your money here today'''

Simpson was fired that day because, according to Lash, without authorization he had taken his truck to a Ford dealer to have the speedometer calibrated and had presented the bill to Lash.

B. *Analysis and Concluding Findings*

1. The 8(a)(1) allegation

In Case 5–CA–25971 it is alleged, ''On or about December 15, 1995, Respondent, by Willie Mahannes [(sic], told an employee that Respondent disliked him because of his being with the Union.''

The only evidence of such an event in December is Boran's testimony that after telling Mahanes he had broken a piece of the bumper, ''I said, well, do you think that their reasons for the animosity was because of the union? And he replied that he felt so; yes.''

Closer to the complaint allegation is Boran's testimony that in the summer of 1995 Mahanes made such a comment during a conversation about his job status. Boran testified: ''I asked Willie why the D.C. owner for the D.C. has—the management on Olive Street had such a disliking to me. He stated he wasn't too sure, but that he would say that it was because of my signing the union card, that I was involved with the union.'' According to Boran, this occurred during a discussion they were having ''about an incident that I had had that day. A truck and I had struck mirrors in a tight turn.'' Mahanes denied making such a statement, though he agreed that Boran asked if the Company was mad at him for having signed a union card. Mahanes testified, ''Told him I didn't know anything about the union.''

The incident involving damage to mirrors happened on July 18, 1995, according to the disciplinary warning Mahanes gave Boran. The charge in this case was filed on February 14, 1996, more than 6 months after the incident. Therefore Section 10(b) would not permit finding a violation based on the alleged statement by Mahanes in July.

Further, I conclude that Mahanes did not make the statement attributed to him in December. Mahanes seemed credible and I note that he was not alleged, or found, to have committed any of the antiunion activity found in the previous case.

I do not credit Boran. The statements he attributed to Mahanes, I conclude, were attempts to establish an unlawful predicate for his discharge. These statements (as well as those Sawyer allegedly made in January) are inconsistent with the Respondent's tolerance of Boran's driving record. I

therefore credit Mahanes' denial and conclude that this allegation should be dismissed.

2. The discharges

Motive is an indispensable element of an alleged discharge for union or concerted activity. Union animus is relevant to prove motive. And animus can be inferred from surrounding circumstances. However, animus alone does not prove a violation, or even make out a prima facie case in the sense of being sufficient to establish a violation even in the absence of rebuttal evidence. To prove a case of unlawful discrimination, the General Counsel must show by a preponderance of the credible evidence that an adverse personnel action was motivated by the employee's union or other protected, concerted activity. Here there is established animus, from the earlier case, but insufficient other evidence to prove that Boran was discharged because he signed a union card, or that Simpson was discharged for engaging in concerted activity.

a. *Boran's discharge*

Boran signed a union authorization card in November 1994, a fact which was known to Sawyer by January 1995 and Mahanes at least by July. The General Counsel argues that Lash did not learn of this until the card was offered in evidence at the previous hearing on December 13. This inference sought by the General Counsel is contrary to established Board authority that knowledge of an employee's union activity is inferred up the management chain of command. It is also contrary to the import of Boran's testimony to the effect that Mahanes told him in the summer that the ''D.C. owner'' disliked him because he had signed a union card and his testimony that in January Sawyer said ''I hear you been stirring up trouble down there,'' and ''why don't you pack your f bags and leave.''

Further, on this record it appears, and I conclude, that Mahanes made the decision to discharge Boran. While Lash instructed him to do so after the December 13 incident if Boran caused any more damage, the actual discharge of December 15 was made by Mahanes. He had the authority to discharge employees, as he had exercised in the past.

In any event, from Boran's testimony I conclude that his only union activity was signing an authorization card and this fact was well known to management for nearly a year before he was discharged. Further, if in fact the Respondent was looking for a reason to discharge Boran because he signed a card, as Boran testified Mahanes said in July, such reason would have been undertaken on May 19 when he was first disciplined for damaging a truck. And if not on May 19, then on July 18, or December 9 or 13.

In fact Boran amassed an impressive file of disciplinary warnings relating to damage he caused, but was not discharged until the final accident on December 15. His record, and the fact that he was not discharged earlier belies a conclusion that the Respondent was waiting for an excuse to terminate him for having signed an authorization card.

Additional evidence that the reason offered for Boran's discharge was not a pretext is the fact that six other drivers were discharged between February 20, 1995, and May 13, 1996. Another was issued a warning for having caused damage to a trailer on January 20, 1995, with the admonition that future incidents would result in additional discipline. While the Respondent apparently does not have, or enforce, a strict progressive disciplinary system, it does in fact issue disciplinary warnings and does discharge employees for such malfeasance as causing damage to equipment.

On the evidence of record, it appears, and I conclude, that Boran was treated leniently given the nature and number of the incidents he caused. He certainly was not treated more harshly than others. From these facts, and given his minimal union activity, which the Respondent knew about for nearly a year, an inference that Boran was discriminated against in violation of Section 8(a)(3) is not warranted.

The evidence is strong that Boran would not have been discharged but for the damage he did to his truck on December 15, which followed closely the damage he caused on December 8 and 13. Assuming, therefore, that the General Counsel made out a prima facie case in the shifting burden sense under the test of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), I conclude that the Respondent met its burden of proving that Boran would have been discharged in the absence of his signing a union card.

b. *Simpson's discharge*

During the morning of June 25, The BFI loader was broken at the W Street site where the Respondent's drivers were to drop off empty trailers and pick up loaded ones. While Simpson did pick up a load at about midnight, when he returned there were no loaded trailers. He and other drivers waited several hours, and the issue arose, according to Simpson, whether they would be paid for this time.

He testified that he approached Sawyer and asked ''are we going to get paid.'' He also testified that when Lash arrived, Lash spoke to the group and assured them that they would be paid. Lash testified that he told the drivers that those who were near the Department of Transportation (DOT) limit for hours would be paid even though they did not get a second load, and that the none of the drivers would lose their guaranteed $140 per day.

Lash also testified that after talking to the drivers, Simpson asked to speak to him and according to Lash:

> He came to me and asked, he said, Tony I have got a bill for you. He said I have been trying to get Willie to send this bill up to the office but Willie would not do it. He said Willy told me if I wanted to get this bill paid that he had to come directly to me. So he says, I coming to you. I got the truck calibrated when I had to go to court about my ticket. So I asked him, well, I said well you got my truck calibrated where. I said I already carried it to Mack. And he said well I carried it to the Ford place down in the Richmond area. I think they testified yesterday Colonial.
>
> So, at that point, I say well, how did the calibration come out? He said oh, it came out the same as Mack. So I say well, why did you carry it to a Ford dealer. So he says well, I wanted to try to beat the ticket he say because it makes my insurance go up, it goes against my driving record with a CDL license and some other reason.

Lash went on the testify that when Simpson left to return his truck to the Virginia facility he called the supervisor in Virginia (Mahanes) and told him to fire Simpson.

Simpson was not asked to either affirm or deny that he told Lash on June 25 he had taken the truck to a Ford dealer to be calibrated. He did, however, testify that sometime ''early summer, early spring'' he told Lash, at the office, that he had received a ticket for going 72 m.p.h. in a 55 zone and he wanted the truck calibrated. He testified that Lash agreed and told him to arrange for this with Mahanes and ''if I paid it he would take care of it.''

The parties dispute whether Lash gave him authorization to have the calibration done at the Ford dealership and whether in fact the Respondent compensated Simpson. Simpson testified that he presented the bill to Lash at Lash's office and Lash agreed to pay it and that Lash did so. He testified that the cost of the calibration ($60, $70) was added to a regular pay check but Simpson did not bring the pay check stub or the receipt to the hearing (which would have been helpful in establishing dates) and did not attend the second day. Indeed, his testimony about the calibration incident is sketchy to the point of being almost meaningless.

The Respondent's payroll records do not seem to indicate that Simpson was reimbursed by check; however, this record does show that for the week ending June 25 Simpson had a gross of $756, which is 10 runs at $70 each plus $56. The extra might be for the calibration, or it might be 4 hours of waiting time at $14 per hour. No one was present at the hearing to explain this record. While the Respondent's counsel argues that Lash denied paying Simpson, Lash testified that he ''told him I would take care of it.''

However, Lash first testified that Simpson gave him the calibration bill at the Respondent's Olive Street office (as Simpson had testified), asked to have it paid and Lash said he would not. Lash testified that he then fired Simpson in his own mind 2 or 3 days before actually telling Mahanes to do so. Subsequently, Lash testified that Simpson gave him the bill on June 25 at the W Street loading site, and Lash agreed to pay it. Then as soon as Simpson was on the road to Central Garage, he telephoned Mahanes with the discharge order. These two versions cannot be reconciled and lead one to question Lash's credibility. Nevertheless, simply because a witness is unreliable does not mean every part of his testimony is false.

Notwithstanding that Lash was discredited in the previous case, and his testimony here inconsistent, Simpson's testimony is of limited value. He did not, for instance, confirm or deny that he had asked Lash to have the truck calibrated and Lash in fact had done so at the Mack dealership.

On balance, Lash's version of the events leading to Simpson's discharge are plausible. I do not believe that Simpson ever had permission to have the truck calibrated at a Ford dealership and to have done so was beyond his authority. Certainly discharging one for such an act is not patently unreasonable, though it raises a suspicion. This reason for discharging Simpson might be found a pretext, particularly in light of Lash's inconsistent testimony about when he made the discharge decision, if in fact Simpson had actually engaged in protected, concerted activity of the type which would motivate Lash to discharge him.

I conclude, however, such did not occur. Simpson testified that he and other drivers discussed whether they would be paid, having had to wait several hours because the loader was down. Such is clearly protected, concerted activity. *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), the ''continuing vitality'' of which was questioned by a panel majority in *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

Although interrogated at length by counsel for the General Counsel about an hourly rate for ''wait time'' Lash's testimony that there was no such policy, other than for breakdowns, is consistent with Boran's. Boran testified that if employees had to wait more than an hour for a load, they would get $14 per hour. ''And we had been getting that through most of January [1995] and then it was cut off.'' But whether the Respondent had a ''wait time'' policy for such problems as the broken loader is immaterial. Either way, discussion among employees about being paid for waiting is protected, concerted activity.

Under *Meyers*, in order for one's discharge for having engaged in such activity to be a violation of Section 8(a)(1) the employer must know of the concerted nature of the act. According to Simpson, he approached Sawyer and asked ''Are we going to be paid?'' But he did not state that he was acting on behalf of other employees. It was a reasonable question, whether resulting from group discussion or individual concern. While there was nothing in Simpson's question which would necessarily suggest he was speaking as the result of group action other than the use of ''we'' he subsequently summoned another employee to the discussion. Thus the query about being paid was certainly known to Sawyer, and therefore to Lash, to have been a group concern.

Nevertheless, it is too much a stretch to conclude that he was discharged for this reason. Lash testified without contradiction that several drivers asked about being paid since they were near the end of the 10 hours permissible by DOT regulations. There is no evidence that any other driver was discharge. Lash also testified without contradiction that in other situations, where for instance a truck breaks down, the driver is paid. Simpson testified that on arriving at the scene, Lash told the group that they would be paid.

In short, a simple inquiry about whether the drivers would be compensated, on this record, is not activity which I find would reasonably motivate Lash, even as an antiunion employer, to discharge and employee. Even if it can be imputed that Simpson's question was the impetus for Lash's decision to pay employees, his ready agreement to do so is inconsistent with the argued for inference that he then was moved to retaliate. If he was disposed to discharge an employee for raising the issue of pay for lost time, it follows that he would not have readily agreed to do so.

Even with Lash's questionable credibility and animas toward the Union, it does not follow that every adverse personal decision is violative of the Act. The General Counsel must prove a causal connection between the union or protected, concerted activity and the discharge, and here did not do so. Accordingly, I will recommend this matter be dismissed.

C. *The Respondent's Motion for Sanctions*

Counsel for the Respondent made the following statement in his brief, which I take to be a motion to sanction counsel for the General Counsel:

> The NLRB has sought to sanction attorneys who cause slight delays in trials before Administrative Law Judges. Here, CGC refused to return documents subpoenaed from CWI. CGC had rested his case. CWI was in the middle of putting on its case. CWI needed the documents overnight to decide which ones to offer into evidence and to have copies made in advance. Not only did CGC's refusal to return the documents overnight delay the trial, but CGC dissembled about his reasons for his refusal. In essence, he claimed he needed the documents to help police the testimony CWI's second and final witness. Yet, CGC had left the documents in his office. He had not brought them to trial. Another delay was created while CGC returned to his office to retrieve the documents. Further delays were created while the documents were reviewed and copied. If the NLRB is going to sanction and suspend from practice attorneys who delay trials, the NLRB must set an example by sanctioning and suspending the CGC here. [Footnote omitted.]
>
> Finally, if the NLRB is truly interested in speed trials it should reverse *Agar Packing & Provision Corp*., 81 NLRB 1262 (1949), and sanction a Regional Director who takes 18 months, from the date of the filing of a charge, to schedule a trial.

I find counsel for the Respondent's motion to be without merit. While this matter surely could have been tried with more dispatch, and there was unnecessary colloquy initiated by counsel for the Respondent, there were no inordinate delays. The case was tried in 2 short days, the first adjourning at 4 p.m. at the request of counsel for the Respondent. The case was closed at 2:05 p.m. the second day. Nor is there any basis in law or fact to sanction the Regional Director.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The consolidated complaint is dismissed in its entirety and the Respondent's motion for sanctions denied.

---

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.